

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2179

Cir. Ct. No. 2011CV4275

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

FAMILY BUSINESS LLC D/B/A R PLACE ON PARK,

DEFENDANT,

RODERICK FLOWERS,

**INTERVENOR-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

**MICHAEL MAY, CHIEF NOBLE WRAY, CAPTAIN JOSEPH BALLES,
MARIBETH WITZEL-BEHL AND JENNIFER ZILAVY,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. This case comes before us on remand from the supreme court. The supreme court issued an order granting, in part, the petition for review in the case of *City of Madison v. Family Business LLC*, No. 2012AP2179, unpublished slip op. (WI App Sept. 16. 2014). The petition for review was granted solely to allow for “further consideration of whether the \$5[]000.00 forfeiture is a proper remedial sanction for Roderick Flowers’ contempt.” See *City of Madison v. Family Bus. LLC*, No. 2012AP2179, unpublished order (WI July 1, 2015), *cert. denied*, 136 S. Ct. 1181 (2016). The supreme court vacated our decision with respect to that issue. Upon reconsideration, our conclusion remains the same: The circuit court acted properly in finding Flowers in remedial contempt and in imposing the forfeiture as a sanction for the contempt.

I. BACKGROUND

¶2 As set forth in our previous opinion:

The circuit court’s thorough written decision provides an excellent overview of the procedural history of this litigation:

The City of Madison ... filed this action against The Family Business LLC ... under the authority of [Wis. STAT.] §§ 823.02 and 823.03 [(2011-12)¹] ... on September 23, 2011. The

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. In this court’s discussion of the contempt statutes, we cite the current versions because they are the same as they were at the time of the 2012 hearing in all relevant respects.

Complaint alleged [The Family Business] is the owner, operator and holder of a liquor license for “R Place on Park,” located at 1821 S. Park Street in Madison. The Complaint further alleged that “unreasonable, violent and dangerous nuisance activities occurring at R Place ... interfere substantially with the comfortable enjoyment of the life, health and safety of others, thereby creating a public nuisance.” The City sought a temporary injunction.

On September 27, 2011[, the circuit court] held an evidentiary hearing on the City’s motion for [a] temporary injunction. Based on the testimony, the court concluded that the City had met its burden of proof for a temporary injunction, stating “that in balancing the factors which argue against closure, against the extreme level of violence and danger, the city is very likely to succeed in the lawsuit to prove that R Place is a public nuisance.” The court granted a temporary injunction closing R Place.

On October 20, 2011[, the circuit court] granted the motion to intervene filed by the agent for [The Family Business], Roderick Flowers....

....

In the meantime, the City filed an order to show cause for contempt, alleging that Flowers had repeatedly violated the temporary injunction by hosting parties at R Place, necessitating police presence and enforcement. Following an evidentiary hearing on April 18, 2012[, the circuit court] found that “Mr. Flowers willfully disobeyed the Court’s October 17th Order by being open and having a party or gathering on October 30, November 16[,], and December 26, 2011 and on March 23/24, and April 6, 2012.” The court also ordered Flowers to pay a \$5000 forfeiture and warned of other sanctions for any future violations. [Record citations and footnotes omitted.]

In its decision and order dated August 20, 2012, the circuit court made findings of fact and, based on those findings, concluded that the operation of R Place constituted a public nuisance. The circuit court ordered R Place permanently closed to abate the public nuisance its operation was causing.

See *City of Madison*, No. 2012AP2179, unpublished slip op. ¶2 (some alterations added).

¶3 Flowers appealed. We affirmed, see *id.*, No. 2012AP2179, unpublished slip op., ¶1, and Flowers filed a petition for review on the sole issue of the circuit court’s contempt finding and imposition of a remedial sanction.

¶4 As stated, our supreme court granted, in part, Flowers’ petition, explaining:

[T]he petition for review is granted in part solely for the purpose of vacating that portion of the court of appeals’ decision addressing the circuit court’s imposition of a forfeiture of \$1[]000.00 for each of Roderick Flowers’ five violations of the circuit court’s October 17, 2011 temporary injunction order (a total forfeiture of \$5[]000.00) and remanding this matter to the court of appeals for further consideration of whether the \$5[]000.00 forfeiture is a proper remedial sanction for Roderick Flowers’ contempt.

See *City of Madison*, No. 2012AP2179, unpublished order.

II. DISCUSSION

¶5 We review the circuit court’s use of its contempt power for an erroneous exercise of discretion. *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990).

¶6 The two types of sanctions that may be imposed for contempt of court are remedial and punitive. See WIS. STAT. §§ 785.02, 785.04(1) & (2). Punitive sanctions may be “imposed to punish a *past* contempt of court.” WIS. STAT. § 785.01(2) (emphasis added). The purpose of remedial sanctions, in contrast, is to force the contemnor into compliance with the circuit court’s orders. *Christensen v. Sullivan*, 2009 WI 87, ¶55, 320 Wis. 2d 76, 768 N.W.2d 798.

Consequently, remedial sanctions are “imposed for the purpose of terminating a *continuing* contempt of court.” WIS. STAT. § 785.01(3) (emphasis added).

¶7 Remedial sanctions may include imprisonment, forfeitures, and “[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.” WIS. STAT. § 785.04(1)(a), (b), (c). These sanctions “must be purgeable through compliance.” *State ex rel. N.A.*, 156 Wis. 2d at 342. “The purge provision must clearly spell out what the contemnor must do to be purged, and that action must be within the power of the person.” *Id.*

¶8 Here, Flowers argues that a \$1000 forfeiture for each of the five violations amounted to a punitive sanction. Additionally, he argues that if the \$1000 forfeiture for each of the five violations was intended to be a remedial sanction, it was not fashioned as an alternative purge condition.

¶9 In a postdivorce context, our supreme court has analyzed whether a circuit court could use its remedial contempt power to remedy circumstances where a former husband, Ronald Henrichs, consistently failed to provide tax returns and income information as required under statute, a divorce judgment, and a court order, but did produce the information prior to the contempt hearing. *See Frisch v. Henrichs*, 2007 WI 102, ¶1, 304 Wis. 2d 1, 736 N.W.2d 85. The circuit court ordered Henrichs to pay his former wife, Heidi Frisch, \$100,000 as compensation for his contemptuous conduct. *See id.*, ¶2. The *Frisch* court concluded that Henrichs’ contempt was continuing at the time of the contempt hearing despite the fact that he had provided Frisch with complete tax and income information. *See id.*, ¶4. The court additionally held that payment of the \$100,000

was an alternative purge condition, the payment of which would terminate the contempt. *See id.* & n.3.

¶10 Just as it was in *Frisch*, the question here is whether the contempt was continuing. *See id.*, ¶53. In answering this question, we are mindful that our supreme court “has put its imprimatur on a broad interpretation of remedial contempt.” *See id.*, ¶55.

¶11 We have carefully reviewed the record.² Pursuant to the temporary injunction order, R Place was to be “closed until further notice of the [c]ourt.” On March 27, 2012, the City filed an order to show cause for contempt alleging that Flowers had repeatedly violated the temporary injunction by hosting parties at R Place, necessitating police presence and enforcement. The City filed its motion pursuant to WIS. STAT. § 785.03(1)(a), which sets forth the procedure for seeking a remedial sanction.

¶12 At the April 18, 2012 order to show cause hearing, the City argued that based on his history, it believed Flowers would continue to violate the court’s order. Flowers, in his remarks to the court, indicated that he did not violate the court’s temporary injunction by having parties and events at R Place. He argued that according to the order, he was only prohibited from having R Place “open for business and selling liquor.”

² We note that the transcript from the order to show cause hearing is an excerpt consisting of the closing arguments and ruling by the court. If the rest of the transcript is in the record, neither party directs us to where to find it. *See Anic v. Board of Review of Wilson*, 2008 WI App 71, ¶2 n.1, 311 Wis. 2d 701, 751 N.W.2d 870 (An appellant has the burden to direct the court’s attention to portions of the record that support a claim.); *see also Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 637-38, 641, 273 N.W.2d 233 (1979) (“[T]he court will assume, in the absence of a transcript, that every fact essential to sustain the trial judge’s exercise of discretion is supported by the record.”).

¶13 The circuit court disagreed with Flowers’ interpretation of its order:

[T]he [c]ourt ordered that R Place On Park remain closed until further notice of this [c]ourt.

I don’t know how much clearer the word “closed” could have been. Closed means not open for business. Closed means not attracting patrons. Closed means not hosting events. I think that was very clear from the get-go, and what’s been happening since then is a course of conduct designed to evade the clear wording of that court order.

The circuit court found that the City established Flowers’ willful disobedience of its order on five separate occasions by clear and convincing evidence.

¶14 Flowers contends, without providing a citation to the record, that he “ended his intermittent acts of contempt a week prior to the City’s filing for a motion to show cause.” Even if this is true, a party cannot disregard a circuit court order and then try to escape a contempt finding by complying at the eleventh hour. *See Frisch*, 304 Wis. 2d 1, ¶¶4, 47.

¶15 This case is nothing like *Christensen*, which is cited by Flowers. In that case, our supreme court concluded “that the circuit court had no discretion to impose a remedial sanction against the defendants after their contempt of court had ceased.” *See id.*, 320 Wis. 2d 76, ¶4 (emphasis omitted). The complainants conceded that Milwaukee County had been in compliance with an order to address overcrowding conditions and poor medical services in the Milwaukee County jail for a number of months prior to when the contempt proceedings were initiated. *See id.*, ¶¶22, 42, 74. There, the contemptuous conduct ceased quite apart from the contempt action, *see id.*, ¶4, whereas here, the contempt action is what caused the contemptuous action to cease. This is a *Frisch* case.

¶16 We conclude that the contempt at issue was of a continuing nature. As the City highlights, there is no evidence in the record to support an inference that Flowers would suddenly begin obeying the temporary injunction order. During the order to show cause hearing, Flowers' remarks revealed that he did not believe the temporary injunction order prohibited him from having parties and events at R Place. Additionally, a chronology of events shows that even after the contempt motion had been filed and the hearing scheduled, Flowers continued to violate the temporary injunction. The City filed its contempt motion on March 27, 2012. Consolidated Court Automation Programs (CCAP) records reflect that an April 3, 2012 notice set the order to show cause hearing for April 18, 2012. *See* WIS. STAT. § 902.01; *see also Westport Ins. Corp. v. Appleton Papers, Inc.*, 2010 WI App 86, ¶82, 327 Wis. 2d 120, 787 N.W.2d 894. The circuit court found that Flowers had a party on April 6, 2012. Absent a contempt finding, the limited record before us supports the conclusion that Flowers would have continued to violate the temporary injunction order.

¶17 The next question, then, is whether the remedial sanction or the alternative purge condition imposed was appropriate.³ *See Frisch*, 304 Wis. 2d 1, ¶63 ("The contempt statute allows the purge condition and the sanction to be the same."). The circuit court imposed a \$1000 forfeiture for each of the five violations.

³ It is frustrating to this court that the City neglected to analyze whether the sanction ordered was an appropriate sanction for remedial contempt. The Chief Justice cued this up as an issue at ¶2 in her dissent from the partial grant of the petition for review in this matter: "*Frisch* [*v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85,] examined the questions of whether a contempt was continuing and whether the sanction ordered was an appropriate sanction for remedial contempt. These are the two questions presented herein." *See City of Madison v. Family Bus. LLC*, No. 2012AP2179, unpublished order (WI July 1, 2015) (Roggensack, C.J., dissenting).

¶18 In *Frisch*, the supreme court explained:

When a court decides to provide a purge condition outside of compliance with the original court order, several requirements must be met. “[T]he purge condition should serve remedial aims, the contemnor should be able to fulfill the proposed purge, and the conditions should be reasonably related to the cause or nature of the contempt.”

Id., ¶64 (citation omitted; brackets in *Frisch*).

¶19 In its motion to show cause, the City detailed the various violations of the temporary injunction, which required police presence at R Place. During the hearing on April 18, 2012, the Assistant City Attorney argued that Flowers’ “complete disrespect for the [c]ourt and for the process ... was illustrated here today when he laughs and thinks it’s hilarious that he tells the police that he turned on the sign [for R Place] just to fuck with them.” The Assistant City Attorney continued:

Well, if he’s fucking with them like he says, then they have to deploy resources to monitor this property that has had parties that have resulted in violent incidents. There is a court order in place that is for the protection of the public, and the police department has a duty to maintain that protection of the public. They can’t just turn a blind eye and not address what’s going on at this property.⁴

¶20 Prior to imposing a \$1000 forfeiture for each of the five violations, the circuit court stated that it had accounted for the testimony relating to the circumstances surrounding the five events, some of which was offered by police officers. Just as the *Frisch* court concluded that the alternative purge condition of \$100,000 was proper where that payment would allow the former husband to

⁴ Again, the partial transcript from the order to show cause hearing does not include Flowers’ actual remarks, only the parties’ closing arguments and the ruling by the circuit court.

purge himself of his continuing contempt, *see id.*, ¶81 & n.25, the same can be said here. The circuit court implicitly found the purge condition served remedial aims by compensating the City for law enforcement costs incurred as a result of Flowers' contempt of court, Flowers was capable of fulfilling the proposed purge, and it was reasonably related to the cause or nature of the contempt.

¶21 As stated above, we have a partial transcript from the order to show cause hearing. Consequently, we assume that the omitted portions support the circuit court's use of its contempt power. *See Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 637-38, 641, 273 N.W.2d 233 (1979) ("[T]he court will assume, in the absence of a transcript, that every fact essential to sustain the trial judge's exercise of discretion is supported by the record."). Therefore, we affirm the circuit court's imposition of a \$1000 forfeiture for each of the five violations as an appropriate remedial sanction for Flowers' contempt. *See Frisch*, 304 Wis. 2d 1, ¶82 ("Our holding promotes the intent behind the contempt statute, which is to provide the court with a mechanism, or toolbox, to effect compliance with court orders.").

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

